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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

YAHYA IBRAHIM,

Cross-complainant and Appellant,

v.

LIQUIPEL, LLC et al.,

Cross-defendants and Respondents.

G055697

(Super. Ct. No. 30-2015-00812942)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Sheila Fell,
Judge. Dismissed.

Thomas Vogeles & Associates, Thomas A. Vogeles and Timothy M. Kowal
for Cross-complainant and Appellant.

Murchison & Cumming and Edmund G. Farrell for Cross-defendants and
Respondents.

INTRODUCTION

Appellant Yahya Ibrahim has appealed from an order denying his motion for leave to file a cross-complaint. He maintains the cross-complaint is compulsory under Code of Civil Procedure section 426.30¹ and that the trial court had no discretion to deny the motion under section 426.50 in the absence of a showing of bad faith.

An order denying a motion for leave to file a cross-complaint is not an appealable order. We therefore dismiss the appeal.

FACTS

Kargil Insaat Turzim San., Tic. Ltd. Sti (Kargil)² entered into a five-year licensing agreement with Liquipel, LLC, for the use of a machine that was supposed to apply waterproof coatings to cell phones and other electronic devices. The machine did not work, and Kargil sued Liquipel for breach of contract and fraud in October 2015. In December 2016, Liquipel cross-complained against Kargil and its three shareholders, Ibrahim, Serdar Ceylan, and Turker Ergun. Three amended complaints later, the parties settled the entire action, on September 21, 2017.

On September 22, 2017, Ibrahim filed a motion for leave to file a cross-complaint. The motion was heard and denied on November 22. Ibrahim filed his notice of appeal on the same day, citing the order of November 22 as the order from which he appealed. The order granting Liquipel's request for dismissal of its cross-complaint was entered on February 26, 2018.

DISCUSSION

Ibrahim based his motion for leave to file his cross-complaint on section 426.50, which provides, "A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or

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All further statutory references are to the Code of Civil Procedure.

²

It appears that Kargil is a Turkish company with its principle place of business in Ankara.

other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action.”

Ibrahim argued that his cross-complaint was compulsory under section 426.30,³ and he could therefore take advantage of the liberal construction of section 426.50.

“An appellate court lacks jurisdiction to consider an appeal from a nonappealable order.” (*Woodman v. Ackerman* (1967) 249 Cal.App.2d 644, 646.) An order denying a motion to file a cross-complaint is not an appealable order. (*Marx v. McKinney* (1943) 23 Cal.2d 439, 443-444; *Security Pacific National Bank v. Adamo* (1983) 142 Cal.App.3d 492, 496 (*Adamo*).) The appeal is rather from the order dismissing the case. (*Adamo, supra*, 142 Cal.App.3d at p. 496; *Miller v. Stein* (1956) 145 Cal.App.2d 381, 385-386 (*Miller*).) The dismissal in the record before us, the one dismissing Liquipel’s cross-complaint against Kargil and the three shareholders, is dated February 26, 2018, three months after the trial court denied Ibrahim’s motion. Ibrahim’s notice of appeal, however, unequivocally identifies the order of November 22, 2017, as the order from which he appeals. The dismissal order did not exist at that point and would not exist for another three months.

³ Section 426.30, subdivision (a), provides, “Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving his answer to the complaint) he has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded.” Section 426.10 provides, “As used in this article: [¶] . . . [¶] (c) ‘Related cause of action’ means a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint.”

We requested additional briefing on the subject of appealability. None of Ibrahim’s arguments in its favor holds water. His claim that Liquipel was suing him in a representative capacity, while he was suing Liquipel as an individual, is belied by a statement in a declaration filed to support an ex parte application to continue trial: “Defendant Liquipel . . . has filed a cross-complaint against me individually” He was not sued in a representative capacity, such as an executor (see, e.g., *Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, 241) or a trustee (see, e.g., *Aetna Casualty & Sur. Co. v. Pacific Gas & Elec. Co.* (1953) 41 Cal.2d 785, 288-289.) In both his cross-complaint and in Liquipel’s he was suing and being sued as an individual. The issues involving him were not fully resolved until Liquipel dismissed the cross-complaint in which he was a cross-defendant. This was the judgment from which he could have appealed. (See *Adamo, supra*, 142 Cal.App.3d at p. 496; *Miller, supra*, 145 Cal.App.2d at pp. 385-386.)

In an effort to avoid the inevitable, Ibrahim has characterized his cross-complaint in his opening brief as a complaint in intervention. We would review the denial of a motion to intervene for abuse of discretion. (*Siena Court Homeowners Assn. v. Green Valley Corp.* (2008) 164 Cal.App.4th 1416, 1427, 1428; *City of Malibu v. California Coastal Com.* (2005) 128 Cal.App.4th 897, 906.)⁴ Ibrahim’s argument, however, concentrated on the bad-faith element of section 426.50, arguing that the court has *no* discretion to deny a motion for leave to file a compulsory cross-complaint *except* on grounds of bad faith. He sought to establish appealability by styling his cross-complaint as a complaint in intervention, but he then analyzed it as a compulsory cross-complaint so as to eliminate the trial court’s discretion. But the pea can be under only one shell. The pleading he sought to file is denominated a cross-complaint. Nowhere –

⁴ Section 387 limits the ability to intervene to non-parties. Ibrahim was already a party to the lawsuit, having been individually named as a cross-defendant in Liquipel’s cross-complaint in December 2016. He answered on June 12, 2017.

until he was required to articulate a statement of appealability – did he mention a complaint in intervention.⁵ That was too late.

DISPOSITION

The appeal is dismissed. Respondents are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

GOETHALS, J.

⁵ Ibrahim contends that if the order is unappealable, mandamus is the appropriate remedy. He did not, however, file a petition for a writ of mandamus, and he gives us no reason to correct that error other than his argument that we can.